In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
THE STEAMSHIP "OLINDE RODRIGUES," La Compagnie Générale Transatlantique, claimant.

No. 704. In prize.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FROM THE DISTRICT OF SOUTH CAROLINA.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF THE UNITED STATES AND THE CAPTORS.

I.

We respectfully submit the following additional arguments upon the points involved in this case:

1. *Distinction between a commercial blockade and a military blockade.*

Blockades are divided into two classes, the commercial blockade and the military blockade. Professor Snow, at page 150, International Law (Washington, 1898), says:

> Blockades may be either military or commercial, or may partake of the nature of both. As military

blockades they may partake of the nature of a land or land-and-sea investment of a besieged city or seaport, or they may consist of a masking of an enemy's fleet by another belligerent fleet in a port or anchorage where commerce does not exist.

As commercial blockades they may consist of operations against an enemy's trade and revenue, either localized at a single important seaport or as a more comprehensive strategic operation by which a portion or the entire sea frontier of an enemy is placed under blockade. A measure of this kind was applied by the British in the war of 1812 to our Atlantic coast; by the Federal Government in the civil war to our southern Atlantic and Gulf coast, and by the United States to the coasts of Cuba in the war with Spain. A measure of this kind is a war operation of vital importance, conducing strongly to a successful peace, not only by the suppression of that part of a nation's revenue arising from customs duties, but by causing a cessation or great reduction of the export of the great products of the country, upon the movement and sale of which so much of the prosperity and the livelihood of its citizens depend. It may also cut off the supply of the imported part of the materials requisite for the effective conduct of the war.

Efforts have been made to do away with commercial blockades by neutral nations. The United States at one time advocated such abolition, but afterwards, during the period of the civil war, established the largest commercial blockade ever known. Of this blockade Dana says:

"It extended from the Potomac to the Rio Grande, both on the Atlantic coast and the Gulf of Mexico, over a stretch of over 3,000 miles. Except at Charleston, the blockading force made no attempt

to reduce the cities blockaded. * * * This vast blockade for four years was purely commercial. The great aid it contributed toward the diminution of the resources of the enemy, their exhaustion, and final surrender, and the now generally recognized necessity for it, have doubtless been instructive to America and the rest of the world." * * *

Charleston was, as Mr. Dana suggests, an example of a sea investment or military blockade and a commercial blockade combined. In cases of this kind a much larger blockading force is necessary.

It is thus seen that our country has recognized the essential difference between a military and a commercial blockade. The commercial blockade is one which deals simply with the exclusion of trade from the ports of the belligerent, whether in neutral or enemy's trading ships. The military blockade involves the idea of armed conflict with the belligerent, either for the purpose of reduction of the port by siege, or by a conflict at the port with the fleet of the enemy. In all cases, wherever there is a possibility of this armed conflict with the belligerent, the necessity of a greater blockading force is apparent. For example, in the late war with Spain the blockade of Santiago as a commercial port could have been very readily effected by a modern cruiser of the type of the *New Orleans* blockading its single entrance; but when Cervera's fleet took refuge there, the operation became one of military strategy against the belligerant, and there was concentrated in this military blockade nearly the entire force of the American navy in those waters. The question of commercial blockade was at first one wholly apart from and independent of

the military blockade of Santiago, which developed into a great naval operation and battle.

It will thus be seen that the force necessary to maintain a military blockade not only is greater than the force necessary for a commercial blockade, but the adequacy of the force varies according to the power of the belligerent to resist the military blockade.

In the same way the adequacy of a force sufficient to maintain a commercial blockade varies with the extent of coast that is blockaded, and depends also on the question whether it be on the one hand a single port with a single entrance, at a small town like that of San Juan of 20,000 inhabitants, with a very limited commerce, or, on the other hand, a port of large size and active commerce, or finally an extensive stretch of coast. In other words, there is a difference in kind between the military and the commercial blockade. There is also a question of degree in both as to the adequacy of the force, whether that force is adequate simply to prevent commercial trading with the port, or also is adequate to meet hostile attack from the enemy.

As long as the commercial blockade is maintained and is practically effective, so as to make it dangerous for trading vessels to attempt ingress or egress from the port, the blockade continues as matter of law to be valid. But when, in armed conflict between the blockading force of the belligerent and the enemy, the blockading force is driven off by the superior military force of the enemy, thereby demonstrating that the military blockade is inadequate and not effective, then the blockade ceases, but not until the blockading force has actually in fact

been vanquished and driven off by the enemy is the blockade raised.

The authorities for this position are very clear. In Snow's International Law, at page 154, the language is:

> A blockade is raised when an enemy's force succeeds in driving off the vessels engaged in the blockade, or when the blockading vessels are withdrawn by the government instituting the blockade.

In Hall's International Law, page 727, it is said:

> This abstention from any pedantic interpretation of general rules extends to cases where, the force being adequate and the fact of blockade known, a ship enters owing to a momentary absence of a blockading vessel, not only when, as already mentioned, the absence is owing to weather, but even when it is caused by the chase of a prize. The blockade is not in these cases raised, and an endeavor to take advantage of such absence is looked upon as an attempted breach. On the other hand, the blockade ceases if an enemy's force succeeds for however short a time in driving off the squadron which is charged with maintaining it. (See also Laurence, International Law, p. 519.)

Here is a clear distinction between a commercial blockade, which is effective and continuous—even through temporary absence of a blockading vessel on account of weather or in chase of a prize—if it is practically effective in preventing egress from and ingress to the port, or, in the language of our cases, makes the egress or ingress simply "dangerous." As long as this condition of danger in attempting to enter the port exists, the commercial blockade exists; but the commercial blockade may not have sufficient strength to withstand an attack of

the enemy; that is, it may not in itself be sufficient to meet and overcome the fleet of the enemy sent against it. It may be inadequate from a military standpoint, and when that appears by actual defeat, and the blockading force is driven off by a superior military force, then the blockade is raised, because from a military standpoint it has proved inadequate.

This difference between a commercial blockade and a military blockade is stated again by Mr. Cass, Secretary of State, to Mr. Mason, June 27, 1859 (3 Whart. Int. Law Dig., p. 373), as follows:

> The blockade of an enemy's coast, in order to prevent all intercourse with neutral powers, even for the most peaceful purpose, is a claim which gains no additional strength by an investigation into the foundation on which it rests; and the evils which have accompanied its exercise call for an efficient remedy. The investment of a place by sea and land with a view to its reduction, preventing it from receiving supplies of men and material necessary for its defense, is a legitimate mode of *prosecuting hostilities* which can not be reasonably objected to so long as war is recognized as an arbiter of national disputes. But the blockade of a coast or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a *war against trade*, and from its very nature against the trade of peaceable and friendly powers, instead of a *war against armed men*, is a proceediug which it is difficult to reconcile with reason or with the opinions of modern times.

The difference between a commercial and a military blockade, the one being simply a war against trade without reference to armed encounter with the enemy, was

recognized by the United States, but we have seen that this protest against the commercial blockade was not accepted by the United States in the civil war, but the doctrine of commercial blockade was firmly established. (See Snow's International Law, *supra.*)

The difference between a commercial and a military blockade is illustrated in this record. Navigator Rooney in his testimony (fols. 341–343) sets this out clearly as to the blockade of Santiago previous to the *New Orleans* coming to San Juan. He says the *New Orleans* was not alone off Santiago, because "we were blockading not only the harbor, but the Spanish fleet as well—Admiral Cervera's fleet;" and giving a list of United States battle ships before Santiago, he further says (fol. 342):

> Q. The blockade of Santiago of which you speak was during the time Admiral Cervera's fleet was in Santiago?
>
> A. Yes, sir.
>
> Q. It was not the blockade of a commercial port, but the blockade of a port where the Spanish fleet had taken refuge?
>
> A. Yes, sir. I would like to say, further, it was a blockade commercially as well, because we were in war with the Spanish Government.
>
> Q. But I mean the special significance of the number of vessels was owing to the fact of Cervera's fleet being there?
>
> A. Owing to the fact that it was a *naval operation* against an enemy's fleet.
>
> Q. And for that reason, the concentration of vessels there?
>
> A. Yes, sir.

It appears from the letters of Commander Davis, of the *Dixie*, and Captain Sigsbee, of the *St. Paul*, that the

desire for reenforcement of the blockade of San Juan was also for this specific purpose—that is, to meet the anticipated attack by that portion of the enemy's fleet which was in the harbor of San Juan. For this purpose only, and not to render effective the commercial blockade, were any other vessels needed after sending the *New Orleans*. In the words of Navigator Rooney, the reenforcement was needed in view of and "owing to the fact that it was a naval operation against an enemy's fleet"—that small remnant of the fleet which was still afloat in San Juan Harbor.

It appears by this record that after the Secretary of the Navy was informed by Captain Sigsbee that it was difficult for the *Yosemite* to blockade San Juan, Admiral Sampson himself officially, in view of all the circumstances, ordered the *New Orleans* to blockade the port and harbor of San Juan.

Lieutenant Rooney in his testimony (fol. 342) says:

> We were ordered by the admiral to go to San Juan to blockade; that was on July 9 or 10. We were sent officially by Admiral Sampson from Guantanamo to blockade the port and harbor of San Juan, and we arrived there on July 14 from Guantanamo.

It thus appears from this record that twelve days after Captain Sigsbee had formally called the attention of the Secretary of the Navy to the necessity of strengthening the blockade of San Juan, Admiral Sampson, commander in chief of the fleet in West Indian waters, sent officially the *New Orleans* to blockade the port and harbor of San Juan. This official action of Admiral Sampson is

itself his answer to that representation and request, and the *New Orleans* was therefore sufficient in his judgment to render the blockade effective.

We have seen in the main brief, that by such action in sending the armored cruiser *New Orleans* to blockade the harbor of San Juan, he had strengthened the blockade fourfold, by reason of the greater armament, longer range of guns, and greater speed of the *New Orleans*, as compared with the *Yosemite*, the converted cruiser, formerly the merchantman *El Sud*, of the Morgan Line.

It further appears that the *New Orleans* was in herself adequate for the effective blockade of San Juan in the opinion of Admiral Sampson, commander in chief of the fleet, who sent her alone for that service on the 9th or 10th of July, from Guantanamo, because Cervera's fleet had been destroyed a week before and the whole naval force engaged before Santiago in that naval operation was at his disposal. His action, therefore, in sending the *New Orleans* alone was not for any lack of other vessels, but must necessarily have been because he, as commander in chief, deemed her in herself adequate.

This difference between a commercial blockade adequate in itself in its war on trade and a military blockade unable to withstand the hostile attack of the enemy is again illustrated by Sir William Scott in *The Hoffnung* (6 Rob., 117), where, after giving full effect to the commercial blockade so long as it continued without interruption, and giving full effect also to the inability of the blockading force to withstand hostile attack, the blockade

being raised or ceasing when the blockading force is driven off, he says:

> When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system; since it could not be expected that any blockade would continue many months without being liable to such temporary interruptions. But when a squadron is driven off by a superior force a new course of events arises, which may tend to a very different disposition of the blockading force and which introduces, therefore, a very different train of presumptions in favor of the ordinary freedom of *commercial* speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed, and therefore, if it is to be renewed, it must proceed *de novo*, by the usual course, and without reference to the former state of facts, which has been so effectually interrupted. On this principle it was that the court held the former blockade to have become extinct, and intimated an opinion that there should be a repetition of the same measures, on its recommencement, to bring it to the knowledge of neutral States, either by public declaration or by the notoriety of the fact.

In this opinion Sir William Scott clearly recognized the commercial blockade as long as it lasted legal effective and binding, although thereafter it proved, in fact, inadequate as a military blockade, in that it was unable to cope with and was actually driven off by the enemy's force.

So that the real question in the light of this opinion, as to the effectiveness or continuance of a commercial

blockade, does not arise until there has been an actual armed conflict between the belligerent and the blockading force and until that conflict is decided. If against the blockading force, then, and then only, is the commercial blockade interrupted. If in favor of the blockading force, then the blockade has been, as a matter of fact, effective, both as a commercial and as a military blockade.

2. *The naval reports.*

This difference in principle between a commercial and military blockade appears also by the letters and affidavits of Captains Sigsbee, Davis, and Folger.

Now, it is to be noted that the reason for the opinion of Captain Sigsbee at that time in his report of June 27, 1898, is shown by his report of June 28 at pages 220–222 of the appendix to the Report of the Chief of the Bureau of Navigation, 1898. In this report he describes the attack upon the *St. Paul* off the port of San Juan by the Spanish cruiser *Infanta Isabel*, or *Isabel II*, a sister ship of the *Don Juan de Austria*, sunk at Manila, and also at the same time by the torpedo-boat destroyer *Terror*, in which engagement the *St. Paul* injured the *Terror* severely and drove the attacking force back into San Juan. It was in view of this attack upon the *St. Paul* and also in view of the fact stated by Captain Sigsbee at page 223, *idem*, to wit: "Although the *St. Paul* is an enormous ship, she has not a great battery" (she was only a converted cruiser and not a warship, and was of short-range guns, 5,400 yards), that he made a recommendation of increasing the blockading force.

It was for this reason also that Captain Sigsbee, in his letter of June 27, 1898, thought that the *Terror* and the Spanish cruiser were also to be borne in mind. He writes as follows:

> It is advisable to constantly keep the *Terror* in mind as a possible active force; but leaving her out of consideration, the services to be performed by the *Yosemite* of blockading a well-fortified port *containing a force of enemy's vessels* whose aggregate force is greater than her own is an especially difficult one. If she permits herself to be driven away from the port, even temporarily, the claim may be set up that the blockade is broken.

It will thus be seen that Captain Sigsbee had in mind not the commercial blockade and the ability of the *Yosemite* to keep all trade ships out of the port, but the force of enemy's vessels whose aggregate force was greater than the *Yosemite*, and who by driving off the *Yosemite* might raise the blockade.

We have seen that the *Yosemite* battery was only of small guns of $3\frac{1}{2}$ miles range, and she was a converted merchantman, *El Sud* of the Morgan line, and was only known as an auxiliary cruiser.

As to the suggestion of Captain Sigsbee in closing this letter—

> I venture to suggest that, in order to make the blockade of San Juan positively effective, a considerable force of vessels is needed off that port, enough to detach some occasionally to cruise about the island. West of San Juan the coast, although bold, has outlying dangers, making it easy at present for blockade runners having local pilots to work in close to the port under the land *during the night.*

We have to remark:

First. That this suggestion is to make the blockade "*positively* effective." This is not the measure of an effective blockade under the declaration of Paris. To satisfy this obligation it need only be dangerous—that is, practically effective; but it is the zeal of an American naval commander to have the blockade positively and absolutely effective, that being the natural ambition and desire of every naval officer in filling in largest measure the cup of diligence and effort in behalf of his country. But this high state of efficiency goes far beyond what the law requires in discharge of international obligation to neutral traders who had on the spot in advance notice and warning of the blockade.

Second. It is not necessary to cruise about the island of Porto Rico in order to render the blockade of San Juan effective, although it might be highly desirable to do so as a means of making it positively effective in the highest sense of naval warfare. It is sufficient under the obligation of international law only to have a modern cruiser like the *New Orleans* directly off the port, making egress or ingress dangerous in fact. It is to be remembered that the President's proclamation was of a blockade of the port of San Juan only, and not of the coast.

Third. Again, this appears by Captain Sigsbee's reference to blockade runners with local pilots working in close to the port under the land during the night. We have already seen that it is not necessary for a blockade to be effective that it shall absolutely prevent the ingress

of vessels during the night. That has always been one of the exceptions allowed in international law.

"The fact that various ships may have successfully escaped through the blockade will not itself prevent the blockade from being an effective one by international law."

"Vessels may get in or out during the night or fogs or violent winds, but this does not make it not effective." (Woolsey's International Law, p. 344, quoting Dr. Lushington in *The Franciska*, Spinks' Prize Cases, 111, 125 ~~175~~, in which he says: "But allowing for a reasonable number of these vessels escaping by *night* or during fogs, *which would not in the slightest degree affect the validity of the blockade.*") * * *

Indeed, the actual condition of the coast about San Juan is stated very clearly in the "Navigation of the Gulf of Mexico and the Caribbean Sea," Vol. I, 4th ed., p. 342 (Washington, 1898), issued by the Navy Department, as follows:

> The shore appears to be skirted by a reef, inclosing numerous small cays and islets, over which the sea breaks violently, and it should not be approached within the distance of 4 miles.

So that all that Captain Sigsbee reported was in expectation of a conflict of armed force before San Juan in view of his own engagement, and by way of suggestion of bringing the blockade, not only of the port, but about the island, to the highest efficiency, that is, in his own words, "*positively effective*" as a military, as well as a commercial blockade.

If we examine the official reports of the *Yosemite*, by Commander Emory, we find that her effectiveness was demonstrated by her stopping a large number of vessels and destroying by beaching one Spanish troopship, and by actually stopping the *Olinde Rodrigues*, July 5, coming out of San Juan, and recording the warning in her register. So that, even with the *Yosemite*, her practical effectiveness was demonstrated. (See reports of Commander Emory in printed pamphlet filed.)

So also in respect to the letter of Commander Davis, of the *Dixie*, off Porto Rico, July 26, 1898. This letter again is not written with any doubt or question of the efficiency of the commercial blockade then being maintained by the *New Orleans*—Captain Folger—but is wholly from the standpoint of the doubt of the efficiency of the blockade as a military blockade; that is, as able to cope with the armed force that might come out of San Juan Harbor, i. e., the cruiser *Isabella II*, the torpedo boat destroyer *Terror*, and others which Captain Sigsbee, of the *St. Paul*, had driven back in, and which were again the object of concern on the part of Captain Folger. The letter has this one significance on its face. It opens with this idea, which runs through it:

> Captain Folger kept me through the night of the 24th, as he had information which led him to believe that an attack would be made on his ship during the night.
>
> There are in San Juan, Porto Rico, the *Terror*, torpedo gunboat; the *Isabella II*, cruiser; a torpedo boat, and a gunboat. There is also a German steamer, which is only waiting an opportunity to slip out.

Why does he make this statement? The blockade was not inefficient commercially, for up to this time no vessel had eluded him. The German steamer mentioned in this very letter of Commander Davis, which had waited for an opportunity, had never been able to come out! He himself had captured the *Olinde Rodrigues!* The very next sentence of Commander Davis's letter explains the reason why Captain Folger wanted more ships—that is, only for armed conflict with the enemy, and not for the purpose of commercial blockade. The language is: "It is Captain Folger's opinion that the enemy will attempt to raise the blockade of San Juan, and it is my opinion that he should be reenforced there with the least possible delay." It was the reenforcement of Captain Folger to prevent the success of the enemy in an attempt to raise the blockade of San Juan by an attack upon the *New Orleans* by the vessels in San Juan.

There is no report, or the slightest suggestion whatsoever of his lack of ability to maintain an effective commercial blockade, which he had always done. The sole suggestion which began the letter and which ends it is his possible danger in a conflict with the enemy—that is, a naval battle which might result in the raising of the blockade of San Juan. This concern, that by a naval battle the blockade of San Juan might thereafter be raised by the defeat of the American cruiser, showed conclusively that in the mind of Captain Folger at the time there was then and had been theretofore an existing effective commercial blockade. If the enemy might thereafter raise this blockade, there then would be put

upon the United States, under the authorities we have above quoted, the necessity of reestablishing by due notification to neutrals. This is the meaning of this letter in the light of all the reports of practical efficiency as to the commercial blockade and in the light of the capture of the *Olinde Rodrigues*, demonstrating the effectiveness of the blockade at the port of San Juan—this, we say, was the only meaning of these reports, the doubt of strength to cope with the force of the enemy.

That doubt of military and naval strength to cope with the force of the enemy may exist as to all blockades. If the *New Orleans* (Captain Folger) standing 6 miles off Morro had been strengthened by a dozen vessels, he might not have increased the effectiveness of the commercial blockade, but simply have multiplied his force uselessly. He would however have strengthened the military blockade, although he might not even then have made himself impregnable as against the hostile attack of the fleet of the enemy. If the effectiveness of a commercial blockade is to be measured by the impregnability of the blockading force in attack by the enemy, no blockade can ever with certainty be said to be effective. Indeed, there is no such principle in international law, the fixed principle being that the blockade remains effective if practically effective, and is legal and binding until it has been raised by an actual driving away of the blockading force of the belligerent in armed conflict with the enemy. Until this result happens the neutral trader has no right to ask whether a military blockade, as against the possible superior strength

of the enemy's fleet, is effective. He is concerned with and only with the commercial blockade, and we have shown that if he has notice and in defiance of notice attempts to violate an actual blockade and is captured, the only measure required of the belligerent as to him is that the blockade was dangerous for him to enter, and after notice actual capture demonstrates its effectiveness. The neutral trader can not speculate upon the result of a possible future armed conflict, nor can he demand as a measure of effectiveness of blockade for himself that which might ultimately become necessary as a means of military effectiveness; that is, impregnability against the enemy's armed naval attack.

Not only does this view appear upon the face of these reports and is their obvious inherent purpose, but this more fully appears by the affidavits of Commander Davis and Captain Folger, which are in evidence and make clear the meaning of these letters, to wit: That the commercial blockade was, in their judgment, effective by reason of what they had actually accomplished and by reason of their confidence in what they could do practically in keeping vessels out of San Juan; and that these letters had reference, as appears upon their face, only to the possible armed conflict with the enemy's force of vessels in San Juan. In reply to claimant's contention that the position taken by Captain Folger of the *New Orleans* and Captain Davis of the *Dixie*, in their affidavits, that reenforcement was wanted solely for the military blockade, in view of a possible attack, and not in aid of the commercial blockade, was an afterthought—we submit that this is unfair criticism and wholly unwar-

ranted by the facts, for both the letters of Captain Davis and Captain Sigsbee show on their face that the possible *attack of the enemy* was expressly the *occasion of both letters* and the reenforcement was asked specially and only in that connection, to prevent the existing blockade from being raised.

3. *The cases of the Franciska and the Nancy.*

This efficiency of the blockading force not only demonstrated by practical experience, but further testified to here by Captain Folger, commanding, and Commander Davis, on the spot, and by the official reports of Commander Emory, containing the detail of this effective, practical work, will have the largest consideration of this court. Indeed, in the case of *The Franciska*, Spinks' Prize Cases, 111, Dr. Lushington accepted the affidavit of Sir C. Napier, who in that case deposed that "on the 17th of April he placed the ports of Libau, Windau, and the Gulf of Riga under strict blockade, and the *Conflict*, the *Cruizer*, the *Archer*, and the *Desperate* were stationed off that coast with others to maintain the blockade." The fact is that the blockaded ports and coast were about one hundred miles in extent, and upon this statement Dr. Lushington says (p. 116):

> I can see no reason to suppose that a force of three or four steam vessels was not perfectly adequate to blockade the coast of Courland, from Libau to Lyser Ort, a distance of less than a hundred miles. Indeed, I am satisfied that evidence to establish the fact according to precedent and the law of this court has been adduced to justify the conclusion that the force appointed to blockade that coast was adequate to an efficient discharge of that duty.

If in 1855 four vessels of the type of these English vessels at that date were *perfectly adequate* to blockade two ports and the Gulf of Riga, a distance of about 100 miles, *a fortiori*, the *New Orleans*, the modern cruiser, representing in herself several units of the vessels mentioned by Sir C. Napier, was perfectly adequate to blockade the one port of San Juan with its single entrance and population of about 20,000 inhabitants.

Again, in the case of *The Nancy* (1 Acton's Privy Council Cases, 64), Sir W. Grant reversed the judgment of the court below and held that "under particular circumstances a single vessel may be adequate to maintain the blockade of one port, and cooperate with other vessels at the same time in the blockade of another neighboring port." This is even a stronger case than the case at bar, for in the case of the *Nancy* there was not only the blockade of Trinity the port in question, but there was cooperation in the blockading of another port more than 7 miles distant. On the question whether the frigate of that day (and she must have been a sailing ship, for it was in 1809) was completely adequate for the service required to be performed, Sir William Grant said:

> As it appears the commander on that station considered the force employed completely adequate to the services required to be performed, we feel it necessary to rely on his judgment.

That case, again, was a question simply of commercial blockade of the port of Trinity, and at page 65, *idem*, the *Actress*, the *Freedom*, the *Adrian*, and the *Eagle* were all condemned by Sir William Grant under the operation of the same principle.

4. *As to the admissibility of the reports and affidavits.*

While the authorities establish that the court will take notice of laws and judicial decisions of treaties and proclamations by the President, and of the rules and regulations of the principal departments of the Government, as well as of various other facts and matters generally known within their jurisdiction, and may even notice an official statement made by the head of one of the branches of the Executive Departments which relate to the records under his control, it has been decided that there is no rule requiring courts to take notice of orders issued by a military commander. This determination would seem to include the case at bar.

(See, for the principles upon this subject, *Marbury* v. *Madison*, 1 Cr., 137; *Lamar* v. *Micou*, 114 U. S., 218; *Brown* v. *Colorado*, 106 U. S., 95; *The Scotia*, 14 Wall., 170; *Armstrong* v. *United States*, 13 Wall., 154; Prize Cases, 2 Bl., 635; *Brown* v. *Piper*, 91 U. S., 37; *Caha* v. *United States*, 152 U. S., 211; *Heath* v. *Wallace*, 138 U. S., 573; *Nix* v. *Hedden*, 149 U. S., 304; *Burke* v. *Miltenberger*, 19 Wall., 519.)

It is therefore submitted that in strictness it would extend unwarrantably the principle of judicial notice to admit without explanation isolated official statements which might vitally affect the case, and this, too, after the appellees had an opportunity below to examine witnesses on the subject.

We do not, however, desire to resist contentiously the consideration of these documents. Submitting them, therefore, to the judgment of the court, should not the

affidavits also be considered? If this were a regular application for further proof, and further proof were ordered, it should be taken by depositions under a commission, according to rule 12 of the court. This rule was adopted at February term, 1816, with special reference to prize, as shown by the case of *The London Packet* (2 Wheat., 371). See also Mr. Justice Story's remarks in *The George* (2 Gall., 249). The earlier method of taking proof in prize causes, both in England and America, was usually by affidavits and other papers introduced without any formal allegations in the discretion of the court, the more solemn proceeding of plea and proof not often being resorted to. (See Sir William Scott's letter to Mr. Jay, p. 1 of Mr. Justice Story's notes on the Principles and Practice of Prize Courts; id., p. 23; *The Frances*, 8 Cr., 348; *The Magnus*, 1 Rob., 31; 1 Wheat., p. 503, Appendix.)

In the United States, affidavits on both sides were formerly admitted, (*The Frances, supra; The Sally*, 1 Gall., 401).

As this is not a formal application for further proof, and as the discretion of the court is particularly ample with reference to evidence in prize causes, in which the common-law rules of evidence are not applied, we submit that the affidavits should properly be received and considered. Under the English practice proof by affidavit on the part of the captors may be admitted under the special direction of the court (*The Adriana*, 1 Rob., 313). In *The Harmony*, (2 C. Rob., 322) successive affidavits on the part of the claimant were accepted, and in *The Amy Warwick* (2 Sprague, 150; Fed. Cas., No. 343)

Judge Sprague declined to decide on formal order for further proof that affidavits were inadmissible, and thought that less strictness should be required of a party merely offering counter proof.

We therefore submit that under all the circumstances of the case, and on principle as well as by authority, the court may properly accept the affidavits offered, and thus give the captors an opportunity to explain the meaning of the statements made.

5. *As to the complaint that the passengers' testimony was not taken.*

In reply to the contention of the claimant that the duty of the district attorney in the court below was to take the testimony of all the passengers that were on board the ship, we submit that it has never been the practice to take the statements of the passengers. Indeed, it is not contemplated that passengers shall be examined; the interrogatories are obviously not framed for them; they are not supposed to be aware of the facts relating to the vessel, her destination, and cargo, which are peculiarly within the knowledge of the master and crew. No doubt they might have been examined on behalf of the claimants upon the order for further proof. The books all speak of the witnesses *in preparatorio* as the captors' witnesses. (Story, Principles and Practice of Prize Courts, p. 16; Rule 16, Rules in Prize Cases in the Southern District of New York, which appear to have been generally adopted in the various districts during the civil war.) It is not usual to examine more than four or five witnesses in the first instance. (*The Elizabeth*, 8 Fed. Cas., p. 463.) In

that case, where the crew consisted of twenty-one persons, it was objected that only the master and the cabin boy were produced as witnesses before the prize commissioners, the court stating that, under the existing twelfth prize rule, the captor shall produce three or four of the company or persons who were captured with the captured property; and in case the capture be a vessel, the master and mate or supercargo must be two. During the revolutionary war cruisers were instructed to bring in one or more witnesses from the prize, and private armed vessels to bring in the master and one or more of the principal persons.

However, in this case, out of abundant caution, the district attorney did take the deposition of Julien, a priest and one of those who signed the statement addressed to the master appearing in the supplement to the printed record (fol. 24). The testimony of this one passenger was actually taken by the prize commissioners and disclosed an impression on his mind that the *Olinde Rodrigues* was bound for San Juan if she could enter (see fol. 26 of the record).

The district judge, on first hearing, at folio 152 of the record, discredited this witness, but this he did, not because of anything appearing in the record and not because of anything which he himself has put upon the record, and what was the cause of discredit does not appear. We therefore submit that before this court, no cause of discredit appearing on the record, and being unimpeached, and no contradictions being shown in his own statement, and the district judge himself not giving to this court any reason for discrediting the witness, the deposition

not being taken before him, the evidence of this witness is to be regarded as equally trustworthy as the others. For this court can only decide this question of fact as the district judge could decide it, that is, on the written depositions as they appear in evidence.

Moreover, if we take the unsworn statement of these passengers as it is set forth in the letter to the captain, annexed to his test affidavit, the court perceives how wholly ignorant they are as to maritime matters and the particular matters in issue in this cause. By reference to page 9, folio 21, of the addition to the record, the plan that these passengers drew and signed their names to is itself a burlesque. San Juan is put at the extreme east of the island of Porto Rico, and the cruiser *New Orleans* is put about 60 miles east of San Juan and directly north of St. Thomas! Porto Rico itself is turned nearly upside down, and the distances are wholly impossible in every aspect. There is nothing more ludicrous and hopelessly ignorant than this chart, both as to locality, distance, and bearings.

The only intelligible fact in their communication bearing on this question is the fact, which they could well perceive, as follows: "The cannon shot being fired, the *Olinde Rodrigues* turned larboard directing itself towards the American cruiser" (fol. 21). The vital point in this whole case is confirmed, therefore, by their statement—that is, that the *Olinde Rodrigues* turned to the *New Orleans* only after the shot was fired, and in this statement they contradict the captain of the *Olinde Rodrigues*, who, as we have shown in the main brief, testified that upon the appearance of the *New Orleans* he went

toward her before the shot was fired, and who again (p. 5, fol. 10 of additional record) represented in his letter to the ambassador of France, "I hoisted the flags and went towards her. She fired."

On one of the turning points of this case, therefore, the question of fact that could be seen by all, the passengers concur with the officers of the *New Orleans* to the effect that the *Olinde Rodrigues* turned only after the shot, when danger compelled her obedience.

Furthermore, these unsworn statements of passengers were received as a mere exhibit to the captain's test affidavit and along with his bare assertions in the statement or letter requesting to make an additional explanation. This was irregular, and might have been objected to. The cases are all clear that the claimants ought not to be indulged with a subsequent opportunity to explain damaging statements made upon their first examination and after they know the pressure of the cause. (Mr. Justice Story, in *The Pizarro*, 2 Wheat., 227.) It is obvious that the claimants have no just ground of complaint. The passengers might have been examined on behalf of the claimants under this order for further proof below. But claimants did not offer them, although this court may now, if so disposed, take this unsworn statement of passengers, crude and unintelligible as it is.

6. *Complicity of owners.*

The contention of the claimants that "there is no precedent of a vessel captured for violating a blockade without the complicity of the owner" (p. 7 of brief) is without any merit. We have quoted several cases in our

main brief, and the principle is established in international law that the act of the owner is not necessary; it is only necessary that the act of his agent appear at the time to be one of actual violation of the blockade. (Story, Notes on Principles and Practice of Prize Courts, p. 72.)

Again, in this case it appears that the claimant is a corporation, and that the agents of this corporation at Cape Haitien and Port au Prince, points of departure, furnished the master bills of health and manifests on Spanish account by which he could run the blockade of San Juan; and that the agent of the company at San Juan also telegraphed the master of the *Olinde Rodrigues* that he would *have to take* fifty first-class passengers from San Juan (fol. 87), thereby showing a concurrence in the thoughts and acts of the agents of this claimant company to enable the master to violate the blockade. In the light of this testimony it is idle to say that the claimant company has not connived at the violation of the blockade. It did, by its agents and by its master concurrently, everything it could do to enter San Juan.

The statement at page 2 of Mr. Govin's brief for claimant that "there is uncontradicted evidence that her owners directed the captain not to enter the port of San Juan," is without any foundation in this record. No evidence of this kind appears anywhere. Counsel do not refer to any part of the record as sustaining this statement. On the contrary, as shown in our main brief, the agents of the claimant company combined in three ports to have the *Olinde Rodrigues* run the blockade.

Pherivong, master of the *Olinde Rodrigues*, swears: "On outward voyage at each port I warned *the agent of*

my company * * * that I would not touch at Porto Rico on the return" (fol. 87). Nevertheless he swears that on his return "at Porto Rico and Cape Haitien we found in the papers given us by *our agents* a bill of health and a manifest of no cargo for Spanish ports that we had not demanded" (fol. 87).

It thus appears that the agents of the claimant company, even after notice, were furnishing the captain with bills of health and manifests for San Juan. Again, on the 14th of July the claimant company, *by its agent at San Juan*, cabled to Captain Pherivong to come to San Juan.

Captain Pherivong swears:

> Returning to Cape Haytien on 14th of July at 11 o'clock * * * they gave me on my arrival a dispatch from the agent at San Juan, saying that we would have to take fifty passengers, first class, and to hasten our journey by one day.

So it conclusively appears that the claimant company, *by its agents* in three ports, was urging the captain to violate the blockade, stating the reasons and providing the means therefor, and by this record this is the only evidence of any instruction, express or implied, from the owner, and it is directly opposed to claimant's contention.

7. *Position of New Orleans off San Juan.*

Referring to the fourth ground of the claimant that "the Government has failed to prove the effective character of the blockade in question, and that the facts show the reverse," we beg to refer to the statement of

fact made by claimants in this connection at page 17, to wit, that the *New Orleans* "was compelled by reason of the land fortifications to be stationed at a distance of 10 or 12 miles at sea" from San Juan.

For this statement of fact there is no foundation in the record. No witness has testified to this effect, and the positive testimony of Captain Folger, of the *New Orleans*, and of Lieutenant Rooney, navigator of the *New Orleans*, is directly to the contrary.

Captain Folger, at folio 167, page 73, of the record, says: "The previous day [the 16th of July] we lay within 6 miles of Morro all day long, bearing south. We were north of Morro, just outside the range of her guns."

And Lieutenant Rooney, navigator of the *New Orleans*, at page 155, folio 322 of the record, says: "Our custom—Captain Folger's custom—and habit was to remain between 6 and 7 miles from the Morro."

It therefore conclusively appears that the *New Orleans* was not compelled to be farther than 6 miles from Morro, from which position she commanded the entrance to the port, as well as 6 miles to the north, eastward and westward, and by her speed could reach, as we have shown in our main brief, any point of circles of very much larger diameter within a few minutes.

On this vital question, therefore, in this case, the fact, as stated by the claimant in his brief at page 17, without referring to any portion of the record for support, is utterly without foundation.

8. *Position of "Olinde Rodrigues" when captured.*

Finally, we call attention to the gross inconsistencies of the several positions assumed by claimant as to the location of the *Olinde Rodrigues.* Her master swears she was on a S. 69 E. course, 9 miles offshore and 7 or 8 miles east of San Juan when captured (p. 37, fol. 79). The second captain, Landgren, swears it was 4 miles east of the port of San Juan and 9 miles away (fol. 69). The log of the *Olinde Rodrigues* claims that she was on a S. 73 E. course and to have passed San Juan 8½ miles offshore (log, p. 46, Record). The letter of the passengers to Captain Pherivong states that when they first noticed the *New Orleans'* smoke they were 10 miles offshore to the northeast of Morro (fol. 20, additional record). But so utterly untrustworthy and contradictory are all these statements in view of the accurate charting by cross-bearings of the *New Orleans* by Lieutenant Rooney at 9 a. m., fixing the point C on his chart as the pivotal point in this case, that the claimant is finally forced to abandon all these impossible positions, demonstrated to be false, and accept the facts of position and location as contended for by the United States.

We call particular attention to the concluding passage (pp. 10, 11) of the brief of Mr. Govin for claimant, where he says:

> The testimony is clear that she was between 4 and 5 miles from the *New Orleans* when the shot was fired. The testimony is clear that when the two vessels stopped and came together they were 2 or 3 miles east of the port of San Juan, and consequently

> the *Olinde Rodrigues* must have been north of the port of San Juan, at least 5 or 6 miles from shore, when the shot was fired.

This is our contention in the main, and its admission is fatal to the claimant's case. We have demonstrated this in our main brief (pp. 37–56).

This final admission of claimant's counsel has these elements in it:

(1) The *Olinde Rodrigues* was between 4 and 5 miles from the *New Orleans* when the shot was fired.

(2) When the two vessels came together they were 2 or 3 miles east of the port of San Juan (the *Olinde Rodrigues* having come 5 miles to the *New Orleans* in an easterly direction), therefore from a point about 2 miles west of north and south line through Morro when shot was fired.

(3) The *Olinde Rodrigues* was north (or rather north by west) of San Juan when shot was fired, 5 or 6 miles distant from the shore.

This admission of counsel, under their signature, that the *Olinde Rodrigues* was 5 or 6 miles from shore, north of Morro, puts the *Olinde Rodrigues* within the range of Morro guns, and this fact alone condemns her. She can not be within the range and protection of the enemy's batteries and claim to be innocent. Her admitted location there carries with it a presumption *de jure* of guilt under the cases that we have quoted in our main brief from Sir William Scott, adopted by this court, holding that if the course of a vessel carry her under the enemy's batteries, or tends to draw the cruiser pursuing her on that course under the enemy's batteries, the presumption

of guilty intention to violate the blockade is irrebuttable, and condemnation follows as matter of law. (Pp. 34–37, 52–56, appellant's main brief.)

9. *Further proof.*

In reply to the argument of claimant requesting, in event of condemnation, an opportunity to put in further proof as to violating the blockade, we beg to call the attention of the court to the fact that by the order of the court below, granting further proof (fol. 230), both to the captors and to the claimants, the time was limited, and that after the captors had put in their proof, the claimants, without adducing any further proof, went to a hearing of this cause on the merits, and yet claimed to reserve their right of adducing further proof, as it may hereafter be advised (fol. 379).

Of this remarkable procedure the court below was moved to say:

> There has been considerable delay in the taking of the additional testimony, owing to the absence from the country of the chief witnesses; but all the testimony in behalf of the captors is now in, and the case is before the court upon a motion to discharge the vessel, proctors for the claimants reserving the right to introduce testimony hereafter, *if the motion is denied*. Without passing upon the question, whether, in a proceeding in admiralty, a party having an opportunity to offer testimony, failing to do so, may draw the opinion of the court upon his adversary's case, and thereafter be permitted to reply to it—a question of practice which is at least doubtful, as counsel were duly warned (fol. 383).

For the court below had warned the claimant's counsel that there was necessity to put in his evidence (if indeed he had any), the court saying:

> "I should be greatly surprised if counsel should consider that there is nothing in the case to require them to put in some testimony (fol. 356). There is testimony of witnesses that the ship was heading directly for San Juan (id.)."

It thus appears that the claimants deliberately, and after warning, did not put in any testimony in the court below according to their opportunity, and to ask now for further proof after the long delay, and getting opinion of lower court and this court, is against the settled practice of this court when a cause in admiralty is before this court finally on its merits, with all the proofs that might have been put in below.

After the court has looked into this cause, if there is any doubt in the mind of the court on this record, the court may *sua sponte* order further proof, but as matter of right to ask this court to send the cause back to the court below on an issue of fact now before this court finally for decision on the merits is indeed unprecedented.

Moreover, it is to be observed that the order of the district court for further proof was limited in the subject-matter of the proof as follows:

> *Ordered*, That the captors have ninety days from the date hereof to supply further proof as to the entry of the *Olinde Rodrigues* into the port of San Juan, Porto Rico, on July 4, 1898, and as to the courses and movements of said vessels on July 17, 1898, and that the claimants may thereafter have

such time to offer testimony *in reply* as may seem proper to the court.

By this express limitation of the subject-matter of the further proof the movement of the *Olinde Rodrigues* and of the *New Orleans* on July 4 and July 17, and the claimant's reply thereto, all other testimony was incompetent in the court below, and therefore the letters which the claimants now seek to introduce in evidence do not come within the limits of this order for further proof and, again, do not appear to have been introduced in evidence by the claimants in the court below, because the record shows that the claimants did not introduce any evidence after the further proof taken for captors, but, on the contrary, went to a hearing of the cause expressly claiming the right to introduce further proof thereafter, *if the motion should be denied*. But the motion was granted, and under the claimants' express terms his reservation of further proof is at an end.

Indeed the principle is, that upon further proof allowed and taken and the cause heard, it is not opened again. This is settled procedure.

At page 429, Upton's "Maritime Warfare and Prize," third edition, it is thus stated:

> On return of further proof allowed, if any taken, the cause is again heard in its order upon the original and supplementary proof, and not again opened.

10. *As to costs.*

The court below not having dealt with the question of costs, this matter is wholly in the control of this court and on all the facts of the case. In asking for a reversal of

the judgment of the court below and a condemnation of the steamship, we would ask also for costs and expenses against the claimants, especially in view of the fact that the court had offered to the claimants the bail of this steamship, under its order dated September 16, 1898 (fol. 232), by simply giving the bond of the claimants' company without sureties, in the sum of $125,000, which the claimants have not availed themselves of, thus entailing continuous large expense, which is indicated in part at folio 374. These peculiar facts call for the exercise of the discretion of the court as to costs. Even on decree for restitution, this court has heretofore repeatedly, under the peculiar circumstances of the case showing justifiable conduct on the part of the captors, decreed both costs and expenses against the claimants. See in full the following cases, where such costs and expenses against the claimants on restitution were allowed to the captors:

The Dashing Wave, 5 Wallace, 170.
The Science, 5 Wallace, 178.
The Volant, 5 Wallace, 179.
The Jenny, 5 Wallace, 183.

And see further on the subject:

The Mary, 9 Cr., 126.
The Venus, 5 Wheat., 127.
The London Packet, id., 132.
La Amistad de Rues, id., 385.
The Springbok, 5 Wall., 1.
The Sir Wm. Peel, id., 517.

A fortiori the court has the power in this case to impose upon the claimant company the costs and expenses, in addition to the condemnation, which is the usual rule

of condemnation in all cases in admiralty. In the case of the *Langdon Cheves* (2 Mason, 58; 14 Fed. Cas., p. 1111, case 8063), in reference to certain custody fees of a vessel which had been condemned as prize, Mr. Justice Story, sitting on circuit, says:

> In favor of the party entitled to the fees of custody the court will certainly upon his application order them in the first instance to be paid out of the proceeds in court. He has an equitable lien on them for his charges incurred about the property; but these charges are properly and ultimately chargeable against the claimant in cases of condemnation.

11. *Conclusion.*

In conclusion, therefore, we submit that on this whole case the blockade of San Juan was, as a commercial blockade against the neutral trader, effective in fact; it was practically effective in that it was dangerous; that danger was known to the *Olinde Rodrigues* because of her warning on the 5th of July, entered in her log. It was again known and evident to her on the 17th of July, when, defying the signal, she attempted to enter San Juan until she was finally brought to by a shot from the *New Orleans*, almost within range of the battery of Morro. All of these facts, under the authorities and principles which we have cited, rendered this blockade legal and effective independent of the question of the effectiveness of the military blockade, which concerned only the strength of the enemy, with which the *Olinde Rodrigues* had nothing to do, and upon which she could

not act, until in fact the blockade had been raised by an actual driving off of the *New Orleans* by the enemy's fleet, which under the evidence before this court never did occur.

The case therefore remains as argued in our main brief, and we confidently submit the same as one of lawful capture by the armored cruiser *New Orleans* of the *Olinde Rodrigues* while attempting to violate the blockade of San Juan on the 17th of July; the United States Navy Department, the Commander in Chief, and Captain Folger, of the *New Orleans*, then and there all acting under the principles and precedents of international law and of our own decisions and the instructions of our Government.

Upon this legal capture we ask for condemnation of the steamship and reasonable costs and expenses to the United States and the captors in this suit.

Respectfully submitted for the United States and the captors.

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